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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER BAUTISTA, Defendant and Appellant.	B156992 (Los Angeles County Super. Ct. No. SA040194)

APPEAL from a judgment of the Superior Court of Los Angeles County. William R. Chidsey, Judge. Reversed in part, and affirmed in part.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Christopher Bautista, also known as Christopher Bautista Roman, appeals from the judgment entered upon his conviction by jury of murder (Pen. Code, § 187, subd. (a))[1] and attempted murder (§§ 187, subd. (a), 664). The jury also found the gun use allegations (§ 12022.53, subds. (b) & (c)) and the criminal street gang allegation (§ 186.22, subd. (b)(1)) to be true as to both counts. The trial court sentenced appellant to 45 years to life in state prison. Appellant contends that (1) the evidence was insufficient to support the convictions and the firearm use enhancement, (2) the trial court erroneously instructed the jury that the weapons enhancement applied if a principal discharged a firearm, (3) the trial court erred in admitting evidence of other wrongful criminal acts, (4) the trial court erroneously instructed the jury regarding causation for murder under the provocative act doctrine, and (5) the trial court erred in imposing a 10-year enhancement under section 186.22.

We reverse the 10-year enhancement under section 186.22 and otherwise affirm the judgment.

FACTS

Augustus Dampier's prior encounters with the Culver City Boys gang.

We review the evidence in accordance with the usual rules on appeal. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) On February 24, 1997, Augustus Dampier and his younger brother, Julius, a member of an African-American street gang, the Venice Shoreline Crips, were walking to their car from the Mar Vista Projects (Projects), in the County of Los Angeles, where their family had resided for 14 years. As they passed six to eight members of the Culver City Boys gang, an Hispanic gang, Julius "sort of smirked at them." When Dampier and Julius reached their vehicle, parked on Stoner Avenue near the Projects, the rival gang members began firing at them, one of the bullets hitting Dampier in the shoulder.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

In July 1997, Dampier was returning from work at approximately 1:30 a.m. As he was about to park his car, he heard gunfire, and bullets began hitting his car.

Twice in 1998 Dampier's car was vandalized; three tires were flattened on one occasion, and gang graffiti, stating "Culver City 13," was written on his car on another occasion. Acquaintances in the Culver City Boys gang told Dampier he was targeted due to his brother's gang affiliation.

The charged incident.

Dampier testified to an incident that occurred on April 24, 2000. He was working as a security guard until 1:30 a.m. and arrived home at approximately 3:10 to 3:15 a.m. Entering the Projects, he saw six Culver City Boys gang members "hang[ing] outside." When he finished parking, he noticed, approximately three car lengths behind and to the right of his vehicle, two people jogging toward him, crouching and attempting to stay close to the parked cars. He could not identify them in the dark, but knew from past incidents they were going to attempt to kill him.

Dampier drew his firearm.[2] When he saw a muzzle flash, he began firing back. His assailants fired at least three or four times, but ran when he returned fire. Dampier then felt shattered glass hitting the left side of his face and saw another person firing at him, less than 10 yards to the left and front of his car. Dampier placed a second magazine clip in his gun, exited his vehicle and began shooting at the person to his left, who ran away. Dampier was able to identify that person as Hispanic, but could not otherwise identify him. Dampier walked towards his apartment where his mother and sister had already called the police.

When the police arrived, Dampier told them what happened and the direction his assailants fled. The police told him one of the suspects had been killed. Dampier's bullet-proof vest was hit three times, one bullet ricocheting off the vest into his shoulder.

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2 Dampier was licensed to carry a gun for which he had received training, passed a written firearm safety test and qualified at target shooting.

His wound was superficial, and he was treated at the scene. The police confiscated his vest and his .40-caliber Baretta handgun.

Investigation of the shooting.

Los Angeles Police Department Detective Joe Lumbreras investigated the shooting, arriving at the crime scene a couple of hours after the incident. He observed the dead victim, Carlos Becerra,[3] on the sidewalk not far from the shooting scene, dressed in gang attire and wearing black gloves. Detective Lumbreras testified that gloves were frequently worn by gang members to avoid leaving fingerprints and getting detectable gunshot residue on their hands. Near Becerra's body, Detective Lumbreras recovered a .380-caliber Baretta semiautomatic handgun. He also recovered .40-caliber and .380-caliber bullet casings and bullet fragments dispersed around the shooting scene in a manner consistent with Dampier's description of the incident.

Detective Raymond Terrones, a member of the Los Angeles Police Department special enforcement unit handling gangs, was summoned to the scene. He testified that Dampier was attacked because the Culver City Boys gang felt he was disrespectful by continuing to live in the Projects despite previous encounters with the gang. Detective Terrones opined that the reason two individuals approached Dampier's car from behind, and another from the front left, was to cut off any avenue of escape.

Officer Steven Carnevale, of the Los Angeles Police Department canine unit, also responded to the shooting. His dog led him to Becerra's body and then picked up a scent at 4611 Stoner Avenue, just 75 feet from 4621 Stoner Avenue, the residence of appellant's former girlfriend.

Deputy medical examiner, Vladimir Lavicky, performed an autopsy on Becerra and determined that he died of a gunshot wound to his left arm and chest. He testified that Becerra's wounds and the path of the bullets were consistent with Becerra holding a gun in his left hand, extending his arm and pointing the gun.

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[3] The record reflects different spellings of Becerra's name. We adopt the spelling used in the information.

Daniel Rubin, a criminologist with the Los Angeles Police Department scientific investigation division, examined Dampier's vehicle and a Toyota Camry parked behind it during the gunfight. He performed trajectory analyses of the bullets that hit these vehicles and found the trajectories consistent with Dampier's account.

Starr Sachs, a Los Angeles Police Department firearms analyst, determined from distinctive markings on bullets she test fired from the .380-caliber Baretta found near Becerra and Dampier's .40-caliber Baretta that the .380-caliber bullet casings found at the scene were fired from the weapon found near Becerra and that the .40-caliber casings, including the bullet that killed Becerra, were fired from Dampier's gun. She also concluded from bullet fragments that there were at least four firearms involved in the gun battle.

Evidence linking appellant to the shooting.

Salvador Romo, whose ex-wife and daughter, Dolores, resided at 4621 Stoner Avenue, in the immediate vicinity of the Projects, testified that Dolores was appellant's former girlfriend. Romo denied that appellant was a member of the Culver City Boys gang. He testified in response to detailed questioning concerning events near the time of the shooting that he recalled nothing.

The prosecutor introduced in evidence a tape recording and transcript of an interview Romo gave to the police when he was arrested for possession of a stolen gun on June 1, 2000. Romo told the police that shortly after the shooting, appellant came to his ex-wife's apartment panicked and "running for his fucking life." He was accompanied by another person Romo did not know. Appellant entered the apartment and stayed in Dolores's room for an hour. The other person never entered the apartment. Appellant told Romo "they," meaning appellant and Becerra, were involved in a shoot-out with "black guys." Although Romo did not see blood on appellant, his daughter later told him that appellant had been injured.

Dr. Ayman Neoman, a surgeon working trauma at Martin Luther King Hospital, testified that on April 24, 2000, at approximately 4:40 a.m., he treated appellant for two

gunshot wounds over his right scapula. Dr. Neoman instructed appellant to return for a follow-up visit, but he did not do so.

Los Angeles Police Officer Isaac Lowe responded to a call that there was a patient with gunshot wounds at Martin Luther King Hospital. He spoke to appellant who refused to tell him what happened or give his home or business addresses and telephone numbers.

Detective Lumbreras opined that appellant went to Martin Luther King Hospital, 15 miles from the scene of the shooting, rather than to a closer facility because he knew police would be summoned to the hospital and that police in the area of the shooting would be aware of the shooting, but police out of the area would not.

Appellant's arrest.

On May 22, 2000, Los Angeles Police Officer Andrew Dorcas was working patrol with his partner, Officer Yanez. They observed appellant and two other individuals walking near Braddock Avenue and Slauson Avenue, in the Culver City Boys gang area, less than two minutes from the Projects. Although the temperature was 60 degrees, appellant and one of the other individuals were wearing black gloves and red bandanas, Culver City Boys gang colors. Officer Dorcas was of the opinion they were gang members. When the three individuals saw the officers, they ran. The officers exited their vehicle, looked for them and heard the sound of something being dropped in a metal trash can in a laundry room at 4819 Slauson Avenue. As the officers approached, a male Hispanic, Victor Aguilera,[4] a resident of the Projects, exited the laundry room and was detained. When the officers searched the laundry room, they recovered a handgun and arrested Aguilera.

The officers placed Aguilera in the police vehicle and drove around, returning to the laundry room a few minutes later to check for other suspects. Officer Dorcas observed appellant and Gustavo Perez in the laundry room. The officers recovered another handgun from the laundry room and detained the two individuals. The officers

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[4] In his testimony, Officer Dorcas mistakenly identified Aguilera as "Aguilar."

confiscated appellant's red bandana, address book, gloves and a black nylon material often worn over the head.

Officer David Guiterman responded to a call for backup at the laundry room. He transported appellant to the police station where he observed a blood stain on appellant's right shoulder. Officer Guiterman lifted appellant's shirt and observed two open wounds on his back which appellant said he suffered when he fell off his bike onto a pipe.

After his arrest, appellant gave a recorded interview to the police, admitting he was with Perez and Aguilera that night and wearing a red bandana and gloves, but denying having a gun. He also claimed he was at home in Southgate on the night Becerra was killed, that he received his back injury a month before Becerra's shooting and that he did not obtain treatment for it.

Aguilera testified at trial, admitting that he and appellant were members of the Culver City Boys gang. He also testified to being with Perez on May 22, 2000, when he was detained, but denied being with appellant or receiving a gun from him. But in a tape-recorded police interview, Aguilera said he had obtained the gun from appellant for his protection.

Gang Evidence.

Detective Terrones testified that the Culver City Boys gang was a street gang engaged in criminal activity for themselves and for the group. The gang's territory included the Projects. Detective Terrones opined that appellant was a member of that gang because he had been photographed making gang signs, he associated with gang members and had a phone book containing telephone numbers of active gang members. The detective also identified Becerra, Aguilera and Perez as Culver City Boys gang members. He identified other Culver City Boys gang members who were in prison for a variety of serious crimes.

Detective Terrones testified that the Venice Shorelines Crips were an African-American street gang. He found gang graffiti in the Culver City Boys's Territory that included racial epithets towards African-Americans and testified that gangs were organized predominantly along racial lines.

Defense evidence.

The defense introduced the testimony of two sisters, Fabiola Bueno and Denise Bueno, whose third sister was appellant's former girlfriend. Both testified that they lived in the Projects and knew appellant for approximately five years. On April 24, 2000, at approximately 3:00 a.m., they walked their visiting uncle to his car. They encountered appellant and began speaking with him. He did not have a gun. They heard gunshots and ran to their house during a pause in the shooting. Appellant ran elsewhere, and the sisters did not see him again for a week or more.

DISCUSSION

I. There was sufficient evidence to sustain appellant's convictions and the personal discharge of a firearm allegation.

Appellant contends that there was insufficient evidence that he participated in the April 24, 2000 shooting and that he personally discharged a firearm. He argues that the three items of evidence to establish his participation, Romo's testimony that appellant told him "they" shot Becerra, his membership in the Culver City Boys gang and his actions reflecting a consciousness of guilt establish nothing more than his presence at the scene, which he asserts is insufficient to establish his liability as an aider and abettor. He also contends that even if there was sufficient evidence to establish his guilt for the underlying offenses, there was no evidence he personally discharged a firearm, a requirement, he argues, for application of the firearm enhancement. He points to evidence that Dampier did not see his attackers, none of the weapons for which the casings and bullets were found could be traced to appellant, nor was there evidence appellant possessed a gun. These contentions are without merit.

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the

evidence. (*People v. Autry, supra,* 37 Cal.App.4th at p. 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."' (*People v. Bolin, supra,* 18 Cal.4th at p. 331.)

A. Evidence supporting appellant's convictions.

Appellant construes the evidence in favor of his claim that there is no evidence he participated in the shoot-out. But our task in reviewing for sufficiency of the evidence is to construe the evidence in favor of the verdicts and "indulge every reasonable inference the jury could draw from the evidence" to support the verdict. When so evaluated, there is ample evidence to support the jury's finding that appellant was not only an aider and abettor of the offenses, but a perpetrator.

Romo told police officers that he was at his ex-wife's home on Stoner Avenue in the early morning hours when the shooting occurred. Appellant and a second person came to that location. Appellant was panicked and said that "they got in a shootout up in the projects [¶] . . . [¶] [w]ith the black guys." After Romo made this statement, the following dialogue occurred: "[Detective:] Hold on a minute. He said *they* got in a shootout. Does that mean he and [Becerra] got in a shootout with these black guys? [¶] [Romo:] That's that's what he said." The jury could reasonably infer from these statements alone that appellant participated in the shooting. But there was additional evidence.

Just over an hour after the shooting, appellant was treated at Martin Luther King Hospital for two gunshot wounds to his back. There was evidence that he went to that hospital, more than 15 miles from the scene of the shooting, to reduce the likelihood the police summoned to the hospital would be aware of the shooting.

There was overwhelming evidence appellant was a member of the Culver City Boys gang. He was arrested in the company of gang members wearing its gang colors, was photographed giving gang signs and had an address book with the phone numbers of several members of that gang. There was also substantial evidence that the shooting was initiated by that gang and motivated by gang issues. Becerra, a victim of the shooting, was a member of the gang, the shooting occurred at the Projects which was in gang

territory, Dampier's brother was a member of a rival gang and Dampier had had previous confrontations with the Culver City Boys gang. Appellant's own witnesses, the Bueno sisters, placed him at the Projects at the time of the shooting, in direct conflict to his statement to police that he was at home in Southgate, at that time.

These facts support the jury's guilty verdicts.

B. Evidence supporting the firearm enhancement.

There was also substantial evidence from which the jury could infer that appellant personally used a firearm. As previously stated, Romo told police that appellant told him that appellant and Becerra got in a shoot-out with some "black guys." This evidence was sufficient to sustain the jury's finding that appellant had personally fired a gun during the shooting.

But application of section 12022.53, subdivision (c), in the circumstances presented here, does not require that appellant himself discharge a firearm. That section provides: "Notwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony intentionally and personally discharged a firearm, shall be punished by a term of imprisonment of 20 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."[5] Among the felonies included in subdivision (a) are murder (§ 12022.53, subd. (a)(1)) and attempted murder (§ 12022.53, subd. (a)(18).) Subdivision (e)(1) provides: "*The enhancements specified in this section shall apply to any person charged as a principal in the commission of an offense that includes an allegation pursuant to this section when a violation of both this section and subdivision (b) of Section 186.22 are pled and proved*."[6] (Italics added.)

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[5] We quote the language of section 12022.53 as it was at the time the charged offenses were committed.

[6] Section 186.22, at the time of the charged offenses, provided: "(b)(1) Except as provided in paragraph[s] (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang

The jury found that appellant committed the felonies of which he was charged "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) As a result, pursuant to section 12022.53, subdivision (e)(1), appellant could be assessed with the firearm enhancement if he was merely charged as a principal. A principal is anyone who "directly commit[s] the act constituting the offense, or aid[s] and abet[s] in its commission . . . ." (§§ 30, 31.) The evidence supported the jury's finding that appellant was present, participated in or, at the very least, aided and abetted, his fellow gang members in the violent ambush of Dampier. Thus, even without firing a gun during the incident, appellant could properly be assessed the firearm enhancement.

II. The trial court did not err in instructing the jury that the weapons enhancement applied if a principal discharged a firearm.

The trial court instructed the jury as follows: "It is alleged in Counts one and two that a principle [*sic*] intentionally and personally discharged a firearm during the commission of the crimes charged**,** within the meaning of Penal Code section 12022.53, subdivisions (c) and (e). [¶] If you find the defendant guilty of one or more of the crimes thus charged, and if you find true the allegation that the crime was committed to promote or benefit a criminal street gang within the meaning of Penal Code section 186.22(b), you must determine whether a principle [*sic*] intentionally and personally discharged a

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members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of two, three, or four years at the court's discretion, except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years. [¶] . . . [¶] (5) Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served."

firearm. [¶] The term 'principal,' as used in this instruction, means a person who directly and actively commits the act constituting the crime, or a person who aids and abets the commission of the crime. [¶] The word 'firearm' includes any device designed to be used as a weapon from which is expelled through a barrel a projectile by the force of any explosion or other form of combustion. [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true. [¶] Include a special finding on that question in your verdict, using a form that will be supplied for that purpose. [¶] If you found that this crime was not committed to promote or benefit a street gang within the meaning of Penal Code section 186.22(b), leave this portion of the verdict form blank." The jury found that the crime was committed for the benefit of a street gang.

Appellant contends that the trial court erred in instructing the jury that the firearm enhancement could be imposed if it found that a "principal intentionally and personally discharged a firearm." He argues that the enhancement under section 12022.53, subdivision (c) expressly applies only to a person "who in the commission of that felony intentionally and personally discharged a firearm." It does not apply where the principal was the person who discharged the firearm.

Respondent contends that appellant waived any objection to the principal firearm discharge enhancement instruction because he failed to object to the instruction and to the amendment by interlineations to the information to allege that a principal intentionally discharged a firearm under section 12022.53, subdivision (c). This contention lacks merit.

A trial court must instruct sua sponte on general principles of law relevant to the governing case including the elements of an enhancement. (*People v. Marzet* (1997) 57 Cal.App.4th 329, 339; *People v. Winslow* (1995) 40 Cal.App.4th 680, 688.) As a result, appellant did not, and could not, waive its contention that the trial court improperly instructed on the discharge of a firearm enhancement here.

On the merits, we conclude that the instruction given was proper. As discussed in the preceding section, when it is pled and proved that the offense was committed for the

benefit of, at the direction of, or in association with any criminal street gang, section 12022.53, subdivision (e)(1) provides that "[t]he enhancements specified in this section shall apply to any person charged as a principal . . . ."

III. The trial court did not err in admitting evidence of appellant's subsequent arrest.

During trial, appellant objected that the prosecution's introduction of evidence relating to his arrest on May 22, 2000, a month after the April 24, 2000 shooting, was irrelevant and not within Evidence Code section 1101, subdivision (b). He argued that his arrest was for a different crime, possession of a firearm, than that for which he was being prosecuted and was only proffered in an attempt to introduce other crimes evidence. The prosecutor argued that the circumstances of appellant's arrest were relevant because he was arrested with two other Culver City Boys gang members, he was arrested near the entrance to the Projects, he was dressed in gang attire and he had in his possession an address book that contained telephone numbers of active Culver City Boys gang members. The guns were important, he argued, to explain why the police stopped these people and explained "the course of conduct."

In ruling on the objections, the trial court concluded that the evidence was highly probative on the street gang issue, as appellant was associating with purported gang members. The trial court stated: "I think within that contention at that time and recovery of the guns in the possession of known gang members associated with Mr. Bautista is highly relevant. Granted that there's some prejudicial effect I think on the balance of the probative value."

Appellant contends that the trial court erred in admitting evidence of his arrest on another charge which was improper under Evidence Code sections 210, 300, 352 and 1101 and deprived him of the right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.

Respondent contends that appellant has waived all arguments, other than his argument under Evidence Code section 1101, by failing to assert them in the trial court. We reject respondent's contention.

Appellant did not waive the claims he now asserts. Generally, objections to evidence on the specific grounds asserted must be made or the objection is waived. (*People v. Derello* (1989) 211 Cal.App.3d 414, 428.) However, a specific objection requires no set form of words. (See *People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) Although appellant specifically referred only to Evidence Code section 1101 in his argument before the trial court, the entirety of his argument and the discussion by the court and prosecutor indicate that the relevance of the evidence as well as the balance of the relevance against the potential prejudice called for by Evidence Code section 352 were also considered by the trial court. The primary purpose of the waiver rule is to avoid appeals of issues the trial court could have determined were they presented. All of the issues presented here were considered by the trial court and rejected. We therefore consider each ground asserted by appellant.

Evidence Code section 1101, subdivision (a) provides that evidence of a person's character or trait of character is inadmissible to prove that person's conduct on a particular occasion. Subdivision (b) provides that subdivision (a) does not preclude the "admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than his or her disposition to commit such an act."

In accordance with Evidence Code section 1101, subdivision (b), the evidence of appellant's arrest was relevant to issues other than his disposition to commit the charged crime. As the trial court observed, it was relevant to his membership in a street gang and association with gang members, his commission of offenses for the benefit of a street gang and to his alibi for the Becerra murder appellant provided to police after his arrest.

We evaluate the trial court's relevancy and Evidence Code section 352 determinations under the abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [relevance objection]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352 [Evid. Code, § 352 objection].) "When the question on appeal is whether the trial court has abused its discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized

to substitute its judgment for that of the trial judge." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Abuse occurs when the trial court "exceeds the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

We cannot say that the trial court abused its discretion here. There was conflicting evidence at trial as to whether or not appellant was a member of the Culver City Boys gang; Romo testified that he was not a street gang member and Aguilera testified that he was. Gang evidence was of utmost significance because there was evidence the attack on Dampier was motivated by Culver City Boys gang animosity and an allegation that appellant's conduct was for the benefit of a street gang. The circumstances surrounding appellant's arrest, just a month after the shoot-out, were relevant to his affiliation and activities with members of the Culver City Boys gang. Moreover, at the time of his arrest, he and the other two reputed gang members arrested with him were wearing gloves, often used to prevent leaving fingerprints or getting gunshot residue on the hands, ran when observed by the police and had possession of a gun, evidence of the illegal activity of the gang members germane to the gang allegation. While in custody, appellant gave an explanation for his back wounds and denied that he was at the Projects when Becerra was killed.

Although there was a risk of some prejudice from the challenged evidence, the risk of substantial prejudice was small. Appellant stood accused of murder and attempted murder. When compared to such crimes, it is unlikely that the jury would be significantly swayed by a subsequent arrest for the less serious offense of possession of a firearm. When weighed against the relevance of this evidence, the trial court acted within its discretion in concluding that any prejudice was outweighed.

Even if the admission of the evidence of appellant's gun possession arrest was error, there was no reasonable probability that the error affected the result. (*People v. Watson* (1956) 46 Cal. 2d 818, 836.) As previously discussed, evidence of appellant's involvement in the April 24, 2000 shoot-out was strong. The evidence of appellant's arrest for possession of a gun pales in comparison to the charges against him for murder

and attempted murder in a violent and unprovoked ambush and was therefore unlikely to sway the jury.

IV. Any error in the provocative act and causation instructions was harmless.

A. The provocative act doctrine.

"When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life." (*People v. Gilbert* (1965) 63 Cal.2d 690, 704, reversed on another ground *sub. nom. Gilbert v. California* (1967) 388 U.S. 263.) The provocative act doctrine applies when a victim or police officer has killed a felon. (*People v. Garcia* (1999) 69 Cal.App.4th 1324, 1329.)[7] When the act originally contemplated or attempted is murder, the act of attempting to kill is itself a provocative act. Under the circumstances, the provocative act need not be independent of the underlying felony. (See *People v. Gallegos* (1997) 54 Cal.App.4th 453, 456-457.) If a provocative act is committed by an accomplice who is later killed by a crime victim, that act cannot form the basis for a provocative act murder. As the accomplice cannot be guilty of murder in connection with his or her own death, so the defendant who stands in the shoes of the accomplice cannot be held vicariously responsible for such a killing. (See *People v. Garcia, supra,* 69 Cal.App.4th at pp. 1330-1331.) The provocative act murder doctrine may apply only if a surviving accomplice committed the provocative act. (*Ibid.*)

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[7] Liability is not based on a felony-murder theory because "[w]hen a killing is not committed by a [felon] or by his accomplice but by his victim, malice aforethought is not attributable to the [felon] for the killing is not committed by him in the perpetration or attempt to perpetrate [the felony]" as required in section 189. (*People v. Washington* (1965) 62 Cal.2d 777, 781.) "[F]or a defendant to be guilty of murder under the felony-murder rule the act of killing must be committed by the defendant or by his accomplice acting in furtherance of their common design." (*Id.* at p. 783.)

B. The jury instructions.

The trial court instructed the jury in accordance with CALJIC No. 8.12, on the crime of murder under the provocative act doctrine. It instructed that to establish that crime, it was necessary to prove an assault with a firearm, a surviving perpetrator of that crime committed an intentional provocative act in response to which the victim of the assault killed a perpetrator, and a surviving perpetrator's act was a cause of the death of the other perpetrator.[8] It also instructed the jury in accordance with CALJIC No. 3.40, regarding "but for" causation.[9]

C. The parties' contentions.

Appellant's challenge to the provocative act instruction is two-fold. First, he contends that CALJIC No. 8.12 is defective because it only required that appellant's provocative act be "a cause" of Becerra's death, not that it be a "substantial factor." He argues that this distinction is crucial in a case where the decedent's own conduct was

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8 CALJIC No. 8.12, as given, was as follows: "A homicide committed during the commission of a crime by a person who is not a perpetrator of such crime, in response to an intentional provocative act by a perpetrator of the crime other than the deceased perpetrator, is considered in law to be an unlawful killing by the surviving perpetrator[s] of the crime. [¶] An 'intentional provocative act' is defined as follows: [¶] 1. The act was intentional. [¶] 2. The natural consequences of the act were dangerous to human life, and [¶] 3. The act deliberately performed with knowledge of the danger to, and with conscious disregard for human life. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. The crime of assault with a firearm was committed; [¶] 2. During the commission of the crime, a surviving perpetrator also committed an intentional provocative act; [¶] 3. The victim of the assault with a firearm in response to the provocative act, killed a perpetrator of the crime; [¶] 4. A surviving perpetrator's commission of the intentional provocative act was a cause of the death of Carlos [Becerra]. [¶] If you find the crime of murder was committed, you must find it to be murder of the second degree."

9 CALJIC No. 3.40 "Cause -- 'But For' Test", as given in this case, provided: "To constitute the crime of murder there must be in addition to the death an unlawful act which was a cause of that death. [¶] The criminal law has its own particular way of defining cause. A cause of the death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act the death and without which the death would not occur."

clearly a substantial factor and the jury must contemplate multiple causation. Second, he contends that the trial court erred in failing to instruct sua sponte on proximate cause.[10] He argues that such cause is an element of the offense "and hence an issue upon which a trial court must instruct *sua sponte* when the evidence on the issue is subject to dispute."

At the outset, respondent contends that appellant waived these contentions, having never objected to the giving of CALJIC No. 8.12, having never requested amplification or clarification of this standard instruction and having never objected to the giving of CALJIC No. 3.40 ("but for" causation) in accordance with which the jury was also instructed.

D. Waiver.

With respect to appellant's contention that CALJIC No. 8.12 was defective, we agree with respondent that that claim has been waived. A defendant cannot complain on appeal that an instruction correct and responsive to the evidence was too general or incomplete unless requested to clarify or amplify at trial. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) Moreover, even if not waived, we find no fault with CALJIC No. 8.12. While that instruction does not detail precisely what causation means, like many CALJIC instructions setting forth the elements of a crime, it contemplates further instructions on the specific elements in issue.

Appellant's claim that the trial court erred in failing to instruct sua sponte on "substantial factor" causation stands on a different footing. If the trial court was required to give such an instruction sua sponte, appellant did not, and could not, waive this contention.

In criminal cases, """"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly

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10 Although appellant does not so indicate, we interpret this contention to mean that the trial court had a sua sponte duty to instruct in accordance with CALJIC No. 3.41, pertaining to "substantial factor" probable cause.

connected with the facts before the court, and which are necessary for the jury's understanding of the case.'"" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court encompasses an obligation to instruct all essential elements of the charged offense where it relates to a material issue presented by the evidence. (*People v. Banks* (1983) 147 Cal.App.3d 360, 367.) Even an accurate instruction need not be given if there is no evidence to which it properly relates. (See *People v. Ortiz* (1923) 63 Cal.App. 662, 667.)

Here, there was evidence there were at least three assailants of Dampier. Becerra, one of the assailants, was killed. Appellant could only be responsible for Becerra's murder if a surviving perpetrator committed an intentional provocative act that caused Dampier's deadly response. Thus, there was evidence raising an issue as to whether a surviving assailant or Becerra was the "cause" of Dampier's response. The trial court was therefore obligated to instruct on causation sua sponte.[11]

E. Harmless error.

Contrary to appellant's contention, the trial court did instruct on proximate causation. Rather than instructing on "substantial factor" causation (CALJIC No. 3.41), however, the trial court instructed on "but for" causation (CALJIC No. 3.40). Appellant fails to address the type of causation instruction that was appropriate here, and we too need not address that question because we conclude that even if the wrong proximate cause instruction was given, the error was utterly harmless by even the most stringent beyond a reasonable doubt standard. (*People v. Lara* (1994) 30 Cal.App.4th 658, 676.)

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11 The use notes to CALJIC No. 8.12 states: "'Cause' must be defined. Use CALJIC 3.40 and 3.41." The use note to CALJIC No. 3.40 provides: "If the jury must determine the issue of whether the defendant's act was the cause of the crime, CALJIC 3.40 must be given sua sponte. [Citation.] [¶] Where more than one cause is placed in issue by the evidence, CALJIC 3.41 should also be given." The use note to CALJIC No. 3.41 provides that, "Where cause is in issue, the court must instruct sua sponte on that subject."

"'But for'" or "'sine qua non'" causation provides that "[t]he defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." (Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 266.) "Substantial factor" causation provides that the defendant's conduct is a cause of the event when it is a material element and substantial factor in bringing about a particular result in such manner as to lead a *reasonable* man to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of *responsibility*, rather that in the so-called "philosophical sense," which includes every one of the great number of events without which any happening would not have occurred. (*Lundak v. Board of Retirement* (1983) 142 Cal.App.3d 1040, 1045-1046.) "The substantial factor standard generally produces the same results in cases as does the 'but for' rule of causation. . . . The substantial factor standard has gained favor as a clearer rule of causation and one which subsumes the 'but for' test while reaching beyond it to address other situations, such as independent or concurrent causes. [Citation.]" (*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1415.) "The substantial-factor rule was developed primarily for cases in which application of the but-for rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result." (Prosser & Keeton, Torts, *supra*, § 41, p. 268.)

The "but for" instruction given to the jury was more favorable to appellant than the "substantial factor" instruction he urges should have been given. Thus, even if the instruction here was erroneous, it was more beneficial to appellant and thus provides him with no reason to complain on appeal. (*People v. Dayan* (1995) 34 Cal.App.4th 707, 717.)

V. The trial court erred in imposing a 10-year enhancement under section 186.22.

The trial court sentenced appellant to 15 years to life on the murder count, plus a 20-year firearm use enhancement pursuant to section 12022.53, subdivision (c) and a 10-year gang enhancement pursuant to section 186.22, for a total term of 45 years to life. Appellant contends that the gang enhancement was inapplicable when applied to a

punishment of imprisonment for life. He argues that with such punishment, only the minimum parole term provided in section 186.22, subdivision (b)(5) is to be imposed. Respondent agrees that the 10-year enhancement was inappropriately applied, as do we.

Section 186.22 provides for a 10-year enhancement when a person is convicted of a violent felony, as defined in section 667.5, subdivision (c), "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

Section 12022.53 provides various enhancements for use or discharge of a firearm in the course of committing one of several felonies, including murder. Subdivision (e)(2) of Section 12022.53 provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

The jury here did not find that appellant personally discharged a firearm but only that a principal had done so. Thus, under the explicit language of section 12022.53, subdivision (e)(2), the 10-year enhancement of section 186.22 was erroneously applied.

DISPOSITION

The 10-year enhancement under section 186.22 is stricken, and the judgment is in all other respects affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P.J.
BOREN

We concur:

_____, J.
NOTT

_____, J.
DOI TODD